

82-1298

Office-Supreme Court, U.S.  
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ALEXANDER L. STEVAS,  
CLERK

No.

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IN THE  
**Supreme Court of the United States**

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October Term, 1982

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JOHN McMANUS,

*Petitioner*

v.

COMMONWEALTH OF PENNSYLVANIA,

*Respondent*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF PENNSYLVANIA**

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QUESTION PRESENTED

Did the affidavit in support of probable cause for issuance of a search and seizure warrant provide sufficient information from which the magistrate reasonably could conclude that the unidentified informant was credible and his information reliable? If not, were not petitioner's Fourth and Fifth Amendment rights violated by the admission in evidence at his trial of items seized pursuant to that search and seizure warrant?

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED FOR REVIEW.....	i
TABLE OF AUTHORITIES.....	iii
PETITION.....	1
OPINIONS BELOW.....	2
JURISDICTION.....	3
CONSTITUTIONAL PROVISION.....	4
STATEMENT OF THE CASE	
I. Procedural History of the Case.....	5
II. Statement of the Facts.....	6
ARGUMENT	
THE INTRODUCTION AT TRIAL OF EVIDENCE SEIZED IN VIOLATION OF PETITIONER'S CONSTITU- TIONAL RIGHTS REQUIRES REVERSAL OF THE CONVICTION AND THE GRANTING OF A NEW TRIAL.....	13
CONCLUSION.....	21
APPENDIX	
Judgment and Opinion of the Superior Court of Pennsylvania...	A-1

TABLE OF AUTHORITIES

Cases:	<u>Page</u>
<u>Aguilar v. Texas,</u> 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 723 (1964).....	13, 20
<u>Commonwealth v. Bailey,</u> Pa. ___, 333 A.2d 883 (1975).....	17
<u>Commonwealth v. Chatman,</u> Pa. Super. ___, 418 A.2d 582 (1980).....	17

Other Authorities Cited:

Fourth Amendment.....	4
28 U.S.C. §1257(3).....	3
Supreme Court Rule 33.1(c).....	2

NO.

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SUPREME COURT OF THE UNITED STATES

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JOHN McMANUS,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

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PETITION

For a Writ of Certiorari to the  
Supreme Court of Pennsylvania

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TO THE HONORABLE, THE CHIEF JUSTICE OF  
THE UNITED STATES AND THE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE  
UNITED STATES:

John McManus hereby petitions  
that a writ of certiorari issue to the  
Supreme Court of Pennsylvania to re-  
view its order at No. 334 E.D. Allocatur  
Docket, 1982.

OPINIONS BELOW

The order of the Supreme Court of Pennsylvania, which has not been reported, was filed on December 6, 1982.<sup>1</sup> That order declined to allow an appeal from the order of the Superior Court of Pennsylvania filed April 30, 1982 and published at \_\_\_\_ Pa. Super. \_\_\_\_, 445 A.2d 244. The unreported Memorandum Opinion of the Superior Court affirming the judgment of sentence is reproduced at A-2, infra.

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1. No order or formal notification was issued by the Pennsylvania Supreme Court. Instead, a copy of the cover of the Petition of Allowance of Appeal was mailed to counsel for petitioner with a handwritten notation "Petition Denied Per Curiam 12-6-82." Supreme Court Rule 33.1(c) precludes reduction of this document for inclusion as an appendix hereto.

JURISDICTION

John McManus was convicted in the Court of Common Pleas of Philadelphia County of receiving stolen property; on September 25, 1980, he was sentenced to incarceration for a period of three and one-half (3½) to eight (8) years and was granted bail pending appeal. On April 30, 1982, the Superior Court of Pennsylvania affirmed the judgment of sentence and an application for allowance of appeal was timely filed. On December 6, 1982, the Supreme Court of Pennsylvania denied the application for allowance of appeal.

This Court's certiorari jurisdiction is established by 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION

The issue presented calls upon this court to construe and apply the Fourth Amendment to the Constitution of the United States which provides:

"Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or thing to be seized." USCS Constitution, Amendment Four.



STATEMENT OF THE CASEI. Procedural History of the Case

Following a search of his residence, John McManus was charged in the Court of Common Pleas of Philadelphia County, Pennsylvania in eight informations alleging receiving stolen property and being in the business of doing so. Pretrial motions to suppress the evidence seized were denied on October 2, 1979, and McManus was tried before the Honorable William Porter without a jury. McManus was found guilty only of receiving stolen goods. Following the denial of post-trial motions, Judge Porter sentenced McManus to incarceration for a period of three and one-half (3½) to eight (8) years

and permitted him to remain free on bail pending appeal.

On April 30, 1982, the Superior Court of Pennsylvania affirmed the judgment of sentence of the trial court, and an application for allowance of appeal was subsequently timely filed in the Supreme Court of Pennsylvania. That application was denied without opinion on December 6, 1982.

## II. Statement of the Facts

The prosecution of John McManus for receiving stolen property resulted from the seizure from his home pursuant to a warrant, of certain articles of stolen property. On April 3, 1979, Detective Albert Nespoli of the Philadelphia Police Department obtained

a search and seizure warrant authorizing the search of McManus' home at 1810 East Lippincott Street, Philadelphia, PA for certain items of stolen property. Detective Nespoli, the affiant, had no personal knowledge of the facts alleged in the warrant to constitute probable cause for a search. Instead, the magistrate received fourth-hand information, since Detective Nespoli recited to the magistrate what Nespoli had been told by F.B.I. agent Skarbeck that a confidential informant had told him. Detective Nespoli apparently had no personal knowledge of or contact with the informant; indeed, he did not even know his identity.

The probable cause section of the application for a search and seizure

warrant stated:<sup>2</sup>

"On this date, S.A. William Skarbeck, Philadelphia Office, contacted the affiant via telephone. He informed affiant, that a subject, William Joseph Ward, was now inside 1810 E. Lippincott Street.

"[Affiant has a copy of a warrant charging that] Mr. Ward is presently a fugitive from Leesburg Prison, Leesburg, New Jersey. This subject, along with John McManus, and Joseph Goodwin, have been the subject of joint surveillance attempts by the unit of the affiant, and the F.B.I. [since January, 1979.]

"S.A. William Skarbeck informed the affiant that within the past few weeks, a confidential

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2. Bracketed portions were concededly added by hand in response to questioning of the affiant by the Magistrate prior to issuance of the warrant.

informant, who has given [him] information in the past [18 months,] which has led to [6] arrests [for burglaries]. (sic) This confidential informant told Agent Skarbeck that John McManus, in company with William Ward, and Patsy Logue, were committing numerous burglaries in New Jersey. That after the burglaries, this trio would take the "swag," stolen property back to McManus' residence at 1810 E. Lippincott Street.

"In addition, the confidential informant told S.A. Skarbeck, that he has been inside 1810 E. Lippincott Street, when stolen property along with burglary tools was taken into 1810 E. Lippincott Street, and John McManus, and William Ward, were present. The informant stated, that he saw in the house within the last two (2) weeks, stolen property which included silverware, jewelry, guns, coins, and police radios. [Skarbeck's informant was told by the actors that all the swag was stolen in recent burglaries mostly in New Jersey.]

"S.A. Agent Skarbeck, (sic) further states to the affiant, that this informant has been reliable in the past with information which has led to arrests in the past [18 months for burglaries].

"The affiant and other members of the M.I.U. Det. Graham, Det. Ellis, and Officer Smith, proceeded to 1810 E. Lippincott Street, to execute the New Jersey Fugitive warrant on Mr. Ward. Mr. Ward left 1810 E. Lippincott Street, operating blue and white Lincoln, Temp. Pa. Lic. #4U2-102. Mr. Ward attempted to flee in this auto, and subsequently was apprehended on foot by M.I.U. members Graham and Smith and S.A. Clyde Wilson.

"The subject Ward, was observed leaving 1810 E. Lippincott Street with a large suitcase, and two (2) small travel bags. Subsequent to the arrest of Mr. Ward, the suitcase and travel bags revealed (250) pieces of very fine sterling silver. The silver was adorned with different initials, [none of them the defendants] and the silver is very expensive, usually only found in your finer stores. The subject, Ward, also had on

his person, \$673.00 in U.S. Currency. Mr. Ward presented a driver's license for one Joseph E. Goodwin, 3015 E. Jasper Street and the vehicle was registered to a Helen McManus, 1810 E. Lippincott Street. This subject subsequently gave his true name to Det. Graham, and his street address as 1810 E. Lippincott Street.

"The affiant has the house at 1810 E. Lippincott Street under surveillance, for subjects John McManus and Joseph E. Goodwin, and is also in possession of body warrants for these two (2) subjects charging them with hindering apprehension and harboring a fugitive.

"The affiant would request the issuance of this warrant, execute (sic) immediately on the premises of 1810 E. Lippincott Street to recover stolen property mentioned on the face of this warrant, and referred to by the confidential informant.

"The affiant requests this search warrant to recover stolen items and the mates of the very expensive silver taken from Mr. Ward who is an associate of Mr. McManus. The affiant believes

that if this warrant is not served immediately, the stolen property will be altered or destroyed in some manner since Mr. Ward has been arrested and his associates can be alerted."

The face of the warrant identified the items to be seized as "fine silver service, and flatware, porcelaine (sic), antiques, art objects, coins, silver and gold. Jewelry, diamonds, gold and other precious stones, guns, police radio receivers."

The warrant was issued and executed on April 3, 1979. Certain stolen items were seized and John McManus was prosecuted for and convicted of possessing them.



ARGUMENT

THE INTRODUCTION AT TRIAL OF  
EVIDENCE SEIZED IN VIOLATION OF  
PETITIONER'S CONSTITUTIONAL  
RIGHTS REQUIRES REVERSAL OF THE  
CONVICTION AND THE GRANTING OF  
A NEW TRIAL.

The affidavit in support of probable cause for issuance of a search and seizure warrant was based entirely upon double hearsay since it consisted of information told to an F.B.I. agent by an unidentified informant and then passed on to a Philadelphia police detective by the F.B.I. agent. In Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 723 (1964), this court

mandated that when probable cause is based upon hearsay information, the magistrate must be informed of underlying circumstances supporting a conclusion that the informant is credible or his information is reliable. In this case, insufficient information is recited in the affidavit upon which to conclude either that the informant was credible or that his information was reliable.

The affidavit recites initially that Detective Nespoli received the informant's information through F.B.I. Agent Skarbeck during a telephone call. Petitioner does not contend that an F.B.I. agent is inherently incredible or that his information is unreliable. However, the affidavit is silent as to any prior contacts between Detective

Nespoli and that particular F.B.I. agent. It does not recite any confirmation or attempt at verification by Detective Nespoli that the caller was in fact F.B.I. agent Skarbeck.

More importantly, however, the affidavit fails to provide sufficient information concerning the credibility of Agent Skarbeck's informant and the reliability of his information.

Detective Nespoli recited that Agent Skarbeck had stated that the informant had provided information to him within the past eighteen (18) months which led to six (6) arrests for burglaries. This is insufficient of itself to demonstrate the credibility of the informer. The statement could be read to mean merely that on one occasion within the past year and half the informant supplied

a single bit of information which contributed toward the arrest of six (6) persons for a single offense. Neither the quality nor the quantity of the informant's information is revealed. Moreover, it is significant that the affidavit does not contain the boilerplate averment found in virtually every federal affidavit that the informant has never been shown to have given false or inaccurate information. Nor does the affidavit state whether the six (6) arrests were shown to be justified or legal or whether they resulted in convictions. There is no basis for determining from the averment alone that the informer was credible.

Under Pennsylvania law, it is insufficient to state that an informer

has provided information in the past which led to arrests. Commonwealth v. Bailey, \_\_\_ Pa. \_\_\_, 333 A.2d 883 (1975); Commonwealth v. Chatman, \_\_\_ Pa. Super. \_\_\_, 418 A.2d 582 (1980). Such an unadorned averment does not support a conclusion that the informant has provided reliable information in the past. Thus, Agent Skarbeck's statement to Detective Nespoli that information provided by the informant led to six (6) arrests in the past is not sufficient to demonstrate the credibility of the informant.

Additionally, the affidavit fails to contain information from which the magistrate could reasonably conclude that the information provided by the informant was reliable. The affidavit states that the informant told Agent

Skarbeck within the past few weeks that petitioner and others were involved in burglaries committed in New Jersey and that stolen articles were brought to petitioner's home in Pennsylvania. This information fails to reveal the basis of the informant's knowledge and is so temporally vague as to be valueless in determining probable cause.

The informant's allegations were corroborated, according to the Commonwealth, because one Joseph Ward was arrested on a fugitive warrant outside the premises searched. The informant had told Agent Skarbeck within the past few weeks that Ward was participating with petitioner in burglaries in New Jersey. The informant also told Skarbeck that he was present in the

house with Ward when stolen property was brought in and that the "actors" had told the informant within the past two (2) weeks that the articles had been stolen "mostly in New Jersey." When Ward was arrested by Detective Nespoli's associates, he possessed items believed to be stolen.

The foregoing is insufficient to demonstrate the reliability of the informant's allegation that particular items of stolen property could be found in petitioner's home at the time of the issuance of the search warrant. Despite the vagueness of the warrant's authority to search for and seize "antiques" and "art objects," few of the items specified were seized. Petitioner was prosecuted only for possessing dog tags (value \$6),

miscellaneous pieces of jewelry, two (2) high school rings and a television set. Thus, the informant's stale information was not shown in the affidavit to be sufficiently credible as to satisfy the mandate of this court in Aguilar v. Texas, supra.

Since the affidavit failed to contain sufficient information to permit the magistrate to conclude that the unidentified informant was credible or that his information was reliable, the affidavit did not provide probable cause for the issuance of the search and seizure warrant. Consequently, petitioner was denied due process of law and a fair trial by reason of the admission in evidence at his trial of items seized in violation of the



Fourth Amendment to the Constitution.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the order of the Supreme Court of Pennsylvania denying allowance of appeal.

Respectfully submitted,

  
PAMELA W. HIGGINS

Attorney for Petitioner

Date:

J. 1318/81

COMMONWEALTH OF	)	IN THE SUPERIOR
PENNSYLVANIA	)	COURT OF PENN-
	)	SYLVANIA
v.	)	
	)	
JOHN McMANUS,	)	
Appellant	)	NO. 2215 PHILADEL-
	)	PHIA, 1980

Appeal from the Judgment of  
Sentence of the Court of  
Common Pleas, Criminal Division,  
of Philadelphia County, No.  
669//676 May Term, 1979.

Before HESTER, CAVANAUGH and  
DISALLE, JJ.

Per Curiam:

Judgment of Sentence Affirmed.  
DISALLE, J., did not participate in  
the consideration or review of this  
case.

J. 1318/81

COMMONWEALTH OF	)	IN THE SUPERIOR
PENNSYLVANIA	)	COURT OF PENN-
	)	SYLVANIA
v.	)	
	)	
JOHN McMANUS,	)	NO. 2215 PHILADEL-
Appellant	)	PHIA, 1980

Appeal from the Judgment of  
Sentence of the Court of  
Common Pleas, Criminal Division,  
of Philadelphia County, No.  
669/676 May Term, 1979.

Before HESTER, CAVANAUGH and  
DISALLE, JJ.

MEMORANDUM OPINION:

The appellant, John McManus, was  
adjudged guilty of several counts of  
theft by receiving stolen property on  
May 14, 1980. Prior to conviction, the  
appellant's motion to suppress was  
denied. Post trial motions for a new  
trial and in arrest of judgment were  
denied and this appeal followed, dealing

exclusively with the denial of the motion to suppress.

On April 3, 1979, a search warrant affidavit was presented by the affiant, Philadelphia Detective Albert Nespoli, to a Philadelphia magistrate for the purpose of obtaining a search warrant so that certain items of stolen property could be removed from the appellant's residence at 1810 E. Lippincott Street, Philadelphia. The affiant's source of information for the affidavit was Special Agent William Skarbeck of the FBI, who, in turn, acquired such information from an unidentified police informant.

The confidential informant told Agent Skarbeck that the appellant, William Ward and Patsy Logue were committing frequent burglaries and

thefts in New Jersey and transporting the stolen property to the appellant's residence in Philadelphia. He further informed Agent Skarbeck that he was present when stolen property was taken into the appellant's home. Within two weeks of the issuance of the warrant, the informant stated that he was inside the appellant's home and saw stolen property including silverware, jewelry, guns, coins and police radios. The appellant and his accomplice even told the informant that the property was stolen. The informant was known by the authorities in Philadelphia as one who had disclosed information leading to six arrests in the past 18 months.

The appellant and two of his accomplices, William Ward and Joseph Goodwin, had been the subjects of a

joint surveillance conducted by the Philadelphia Police Department and the FBI three months prior to the time that the search warrant was applied for. In fact, earlier on the same day that the search warrant affidavit was presented to the magistrate, the affiant and other detectives and officials proceeded to the appellant's house to execute a New Jersey fugitive warrant on William Ward. Ward was arrested that day shortly after he was observed leaving the appellant's residence and carrying a large suitcase and two travel bags. Once seized, the suitcase and travel bags were found to contain silver.

Based upon the information supplied by the informant and the results of the surveillance, probable cause was demonstrated and a search warrant for the

appellant's residence was signed and issued by Philadelphia Magistrate, Judge Abraham.

Appellant argues that the search and seizure warrant obtained by Officer Nespoli was issued without probable cause and, therefore, violated the appellant's Fourth Amendment rights. Probable cause was found wanting, the appellant maintains, because the search warrant affidavit did not satisfy the principles formulated in Aguilar v. Texas, 378 U.S. 108, 12 L.Ed. 723, 84 S. Ct. 1509 (1964) and Spinelli v. United States, 393 U.S. 410, 21 L.Ed. 637, 89 S. Ct. 584 (1969).

According to Aguilar, supra, an affidavit supplying the probable cause for the issuance of a search warrant

is sufficient even though based on hearsay and thereby not reflecting the direct personal observations of the affidavit. (sic) See also Commonwealth v. Prokopchak, 279 Pa. Super. 284, 420 A.2d 1335 (1980). However, the issuing authority must be informed of some underlying circumstances which will (1) enable him to judge independently the validity of the confidential informant's statement and (2) enable him to show that the informant was credible or the information reliable.

Appellant argues that the first prong of Aguilar test was not satisfied because the informant's scenario did not include any details that could raise his statement above mere rumor, suspicion or conjecture. According to the appellant, the informant's



statement omitted a description of the appellant's home, a disclosure of where the stolen property was hidden and a detailed description of the stolen items themselves. The appellant further alleges that Aguilar's first prong was not fulfilled because the information supplied by the informant was stale. He cites Commonwealth v. Suppa, 223 Pa. Super. 513, 302 A.2d 357 (1973), in support of this proposition. Suppa, supra, requires an issuing officer to conclude that probable cause for the issuance of a search warrant existed at the time the warrant was issued. In other words, a decision to issue a warrant must be based upon facts closely related in time to the date of issuance.

We do not agree that the information supplied by the informant for the affidavit was stale or was not sufficiently supported by underlying independent circumstances. We find it particularly significant that the informant was present in the appellant's house, saw the stolen property and even learned from the appellant and his accomplices that the property was stolen. Furthermore, it does not alarm us that these observations were made within two weeks of the issuance of the warrant. The circumstances culminating with the arrest demonstrated that the appellant's criminal activity was likely to have continued to the time of the issuance of the warrant. See Commonwealth v. Stamps, 493 Pa. 530, 427 A.2d 141 (1981).

The surveillance conducted by the police and FBI for three months prior to the issuance of the warrant, coupled with the arrest of William Ward on the date of issuance confirmed the informant's observation and demonstrated that such criminal activity was still in progress.

Suppa, then, becomes inapposite because no events there occurred over a 16 day period between the informant's observation and the issuance of a search warrant.

Next, appellant argues that the second prong of the two-part Aguilar test was not satisfied as well because the search warrant affidavit provided no basis to credit the informant's veracity.

The informant's veracity can be confirmed by an affirmative response to any of the following inquiries:

1. Did the informant give prior reliable information?
2. Was the informant's story corroborated by any other source?
3. Were informant's statements a declaration against interest?
4. Does the defendant's reputation support the informant's tip?

Commonwealth v. Albert, 264 Pa. Super. 390, 399 A.2d 1106 (1979).

We find that the informant's observations and statements were, indeed,

corroborated by other sources. For one, the affidavit was corroborated by the continuous three-month surveillance of the appellant's residence. It was also corroborated by Ward's arrest and the discovery of stolen items removed from the suitcase and handbags.

We find that the informant's reliability was demonstrated by the bringing of six other arrests following prior information produced by him. The appellant maintains that without evidence of convictions resulting from those arrests, such prior information cannot be the basis for finding the informant reliable now. We disagree. A comparison of the basis for the issuance of a search warrant with that

of a finding of guilt is tenuous. Search warrants are issued following a finding of probable cause; convictions, of course, are reached only after satisfying a much higher burden of proof. It is far more reasonable, then, to compare the factual basis for bringing an arrest with that of issuing a search warrant. In fact, this Court in Commonwealth v. Chatman, 275 Pa. Super. 5, 418 A.2d 582 (1980), recognized in dictum that arrests alone can establish the informant's credibility providing there was enough relevant information leading to those arrests. Having, therefore, affirmatively answered two of the inquiries for establishing the informant's credibility, we hold that the

second prong of the Aguilar test is satisfied as well.

If the informant's tip does not pass the two-prong Aguilar test, Spinelli v. United States, 393 U.S. 410, 21 L.E.2d 637, 89 S. Ct. 584 (1969), allows the review of other allegations to corroborate the information and thereby determine whether probable cause exists. Having already determined that the search warrant affidavit was adequate for legal search and seizure under Aguilar standards, there is no need to review the evidence within the parameters set by Spinelli, supra.

It must be remembered that great deference is given to the issuing

authority's finding of probable cause in a search warrant affidavit.

United States v. Ventresca, 380 U.S. 102, 85 S. Ct. 741, 13 L.Ed.2d 684 (1965). Affidavits for the issuance of search warrants are compiled by non-lawyers who are operating under feverish conditions in an effort to discover criminal activity before the passage of time eliminates the evidence. We must not apply, then, technical restraints on the issuance of search warrants. Rather, they must be viewed in a realistic and common sense fashion. Ventresca, supra; Commonwealth v. Frye, 242 Pa. Super. 144, 363 A.2d 1201 (1976); Commonwealth v. Matthews, 446 Pa. 65, 285 A.2d 510 (1971); Commonwealth v. Forster, 253 Pa. Super. 433, 385 A.2d 416 (1978).



Judgment of Sentence Affirmed.

DISALLE, J., did not participate in the consideration or review of this case.